

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 4-90:

MONTANA FEDERATION OF STATE)	
EMPLOYEES, MFT, AFT, AFL-CIO,)	
)	
Petitioner,)	
)	
vs.)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
)	AND
DEPARTMENT OF INSTITUTIONS,)	RECOMMENDED ORDER
WOMEN'S CORRECTIONAL CENTER,)	
)	
Respondent/Employer.))	

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I. INTRODUCTION

A formal hearing in the above-captioned matter was conducted on November 7, 1990, in Warm Springs, Montana before Stan Gerke, Hearing Examiner. The hearing was conducted under the authority of Section 39-31-207 MCA, pursuant to ARM 24.26.630 and in accordance with the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

The Petitioner was represented by Dan Evans, Field Representative, Montana Federation of State Employees, MFT, AFT, AFL-CIO. The Respondent/Employer was represented by Steve Johnson, Chief, Labor Relations and Employee Benefits Bureau, State Personnel Division, Department of Administration. Witnesses included Denise Jancic, Correctional Officer Supervisor, Steven MacAskill, Facility Manager, Shawn O'Brien, Correctional Lieutenant, and Tom Gooch, Administrator, Employee and Labor Relations, Department of Institutions. Subsequent to the hearing, the Parties submitted post-hearing briefs.

II. BACKGROUND

On June 4, 1990, the Petitioner filed a petition with this Board for Unit Clarification of the bargaining unit. The Petitioner contended that Correctional Officer Supervisors should be included in the existing bargaining unit comprised of all

1 Correctional Officer I's and Correctional Officer II's working for
2 the employer, excluding all supervisory, managerial, and
3 confidential employees.

4 On June 26, 1990, the Respondent/Employer filed a response
5 with this Board disagreeing with the Petitioner as to the
6 composition of the bargaining unit. The Respondent/Employer
7 contended the position of Correctional Officer Supervisor meets the
8 definition of "supervisory employees" contained in Section 39-31-
9 103(3) MCA and therefore are appropriately excluded from the
10 bargaining unit.

11 III. ISSUE

12 Whether the Correctional Officer Supervisors should be
13 included in the existing bargaining unit comprised of all
14 Correctional Officer I's and Correctional Officer II's working for
15 the employer, excluding all supervisory, managerial, and
16 confidential employees.

17 IV. FINDINGS OF FACT

18 1. The Women's Correctional Center (hereafter the W.C.C.) is
19 operated by the Department of Institutions, State of Montana. The
20 W.C.C. basically consists of two inmate housing units located at
21 Montana State Hospital, Warm Springs, Montana.

22 2. At time of hearing, there were 31 employees and 61
23 inmates at the W.C.C.

24 3. Approximately six months prior to the hearing, the class
25 specification of Correctional Officer Supervisor, class code
26 372015, grade 12 was developed and implemented by request of the
27 W.C.C. Three employees who were classified as Correctional Officer
28 II, class code 372011, grade 10, were promoted the class of
29 Correctional Officer Supervisor.
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1 4. Prior to the development and implementation of the
2 Correctional Officer Supervisor class, the supervisory structure of
3 W.C.C. included the Facility Manager (similar to the Warden's
4 position at the Mens' Prison) and the lone Correctional Lieutenant.

5 5. At time of hearing, all three employees recently promoted
6 to Correctional Officer Supervisor had been in the position for
7 less than six months and were still in probationary status.
8 Additionally, the three new incumbents had not begun performing all
9 of the supervisory duties listed on the recently developed position
10 description of Correctional Officer Supervisor. As the employees
11 receive training, they will exercise corresponding supervisory
12 duties.

13 6. While working their respective shifts, the Correctional
14 Officer Supervisors are considered as the supervisor in charge.
15 The Correctional Lieutenant works Monday through Friday, 8:00 a.m.
16 to 5:00 p.m. and during the remainder of the seven day - 24 hour
17 period a Correctional Officer Supervisor is the only supervisor on
18 duty.

19 7. The Correctional Officer Supervisor participates on
20 hiring/selection committees. However, there is no evidence that
21 the Correctional Officer Supervisor position can, in and by itself,
22 effectively recommend the hiring of any particular applicant.

23 8. Any authority to layoff or recall employees has not been
24 discussed with the Correctional Officer Supervisors.

25 9. The evidence does not indicate the Correctional Officer
26 Supervisors have authority, or effective recommendation, to promote
27 or reward other employees or to adjust employee grievances.

28 10. The Correctional Officer Supervisor has authority to
29 monitor the duties performed by other employees (Correctional
30 Officer II's and, if any, Correctional Officer I's). Should the
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1 Correctional Officer Supervisor determine the duties were not being
2 performed in a satisfactory manner, a counseling session would be
3 conducted with the particular employee. Depending on the result of
4 such discussion, the Correctional Officer can initiate disciplinary
5 procedures. No evidence indicates the Correctional Officer
6 Supervisor could, by his or her discretion, suspend or discharge
7 employees as a result of disciplinary action.

8 11. During the assigned shift, the Correctional Officer
9 Supervisor does direct the work force. Much of the direction is
10 governed by established procedures and policy. Such strict
11 policies and procedures are understandably necessary in a
12 correctional facility. The Correctional Officer Supervisor does,
13 with use of independent judgment, assign specific work duties to
14 employees and transfers employees between housing units at the
15 W.C.C.

16 V. DISCUSSION

17 The Petitioner argues that the incumbents of the newly created
18 Correctional Officer Supervisor position do not perform the
19 supervisory duties described and intended for that position. At
20 time of hearing the Petitioner's argument was correct to a large
21 degree. The Respondent/Employer admitted the incumbents of the
22 Correctional Officer Supervisor would gradually increase exercising
23 supervisory duties as they receive training. However, and at time
24 of hearing, the evidence shows the Correctional Officer Supervisor
25 position does direct other employees and uses independent judgment
26 while making specific work assignments.

27 Section 39-31-103 MCA exempts "supervisory employees" from the
28 definition of an "employee" covered by the Collective Bargaining
29 Act For Public Employees. A "supervisory employee" is defined:

30 ...Any individual having authority in the interest of the
31 employer to hire, transfer, suspend, layoff, recall,

1 promote, discharge, assign, reward, discipline other
2 employees, having responsibility to direct them, to
3 adjust their grievances, or effectively to recommend such
4 action, if in connection with the foregoing the exercise
5 of such authority is not of a merely routine or clerical
6 nature but requires the use of independent judgment.

7 Similar language is found in the National Labor Relations Act
8 at 29 U.S.C. 151(11).

9 The Montana Supreme Court has approved the practice of the
10 Board of Personnel Appeals in using Federal Court and National
11 Labor Relations Board precedence as guidelines for interpreting the
12 Montana Collective Bargaining for Public Employees Act as the State
13 Act is similar to the Federal Labor Management Relations Act, State
14 ex. rel. Board of Personnel Appeals v. District Court, 183 Mont.
15 223 (1979) 598 P.2d 1117, 103 LRRM 2297; Teamsters Local No 45 v.
16 State ex. rel. Board of Personnel Appeals, 195 Mont. 272 (1981),
17 635 P.2d 1310, 110 LRRM 2012; City of Great Falls v. Young (III),
18 683 P.2d 185 (1984), 119 LRRM 2682.

19 The existence of or exercise of any one of the authorities
20 enumerated in the above definition of supervisory employee combined
21 with the use of independent judgment is sufficient to make a
22 determination of supervisory status regardless of how seldom the
23 authority is exercised. George C. Foss Company vs. NLRB, 752 F.2d
24 1407, 118 LRRM 2746, CA 9 (1985). The incumbent Correctional
25 Officer Supervisors have authority to direct, assign, and transfer
26 other subordinate employees. Such exercise of authorities is made
27 at times with the use of independent judgement. Additionally, the
28 Correctional Officer Supervisors have authority to counsel others
29 regarding work performance and can initiate disciplinary
30 procedures.

31 VI. CONCLUSIONS OF LAW

32 1. The Board of Personnel Appeals has jurisdiction in this
matter pursuant to Section 39-31-202, MCA. Billings Montana vs

1 Fire Fighters Local 529, 113 LRRM 3324, 651 P.2d 627, Montana
2 Supreme Court 1982.

3 2. The Correctional Officer Supervisors fall within the
4 definition of supervisory employee [Section 39-31-103(3) MCA] and,
5 therefore, are excluded from the Collective Bargaining Act For
6 Public Employees.

7 VII. RECOMMENDED ORDER

8 IT IS ORDERED Unit Clarification No. 4-90 be dismissed.

9 Dated this 18th day of April, 1991.

10 BOARD OF PERSONNEL APPEALS

11 By: Stan Gerke

12 STAN GERKE
Hearing Examiner

13 SPECIAL NOTICE

14 In accordance with Board's Rule ARM 24.25.107(2), the above
15 RECOMMENDED ORDER shall become the FINAL ORDER of this Board unless
16 written exceptions are filed within 20 days after service of these
17 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER upon
18 the Parties.
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CERTIFICATE OF MAILING

I, Joseph J. Kerkman, do hereby certify
that a true and correct copy of this document was mailed to the
following on the 10th day of April, 1991.

Dan Evans, Field Representative
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